

5 Official Opinion of the Compliance Board 50 (2006)

MINUTES – FAILURE TO PREPARE MINUTES HELD TO BE A VIOLATION EVEN IF MEETING IS LIMITED TO PROCEDURAL MATTERS – OPEN SESSION REQUIREMENT – HOLDING PRE-MEETING SESSION IN SEPARATE CONFERENCE ROOM, HELD TO BE PERMITTED

June 15, 2006

*The Honorable Elizabeth Bobo
Maryland Delegate*

The Open Meetings Compliance Board has considered your complaint concerning the Howard County Planning Board's practices in connection with its "pre-meeting" sessions. For the reasons explained below, we find that the Planning Board's prior practice of not keeping minutes of its pre-meeting sessions violated the Open Meetings Act. However, we find no violation as to the Planning Board's practice of holding these sessions in a conference room separate and apart from the room where regular meetings are held.

I

Complaint, Response, and Supplemental Correspondence

The complaint alleged that the Planning Board regularly holds pre-meeting sessions before its regularly scheduled meetings but does not keep minutes of these sessions, as required by the Open Meetings Act. The complaint noted that on December 23, 2005, Lloyd Knowles, a former member of the Planning Board, requested a copy of the minutes of a pre-meeting session conducted two days earlier. Mr. Knowles received a response indicating that "[w]e do not take minutes for the pre-meeting because typically it is held so the Board can discuss procedural issues, or ask staff to bring supplemental items to the meeting." However, the complaint noted, a member of the Planning Board had stated publicly that, during the course of a pre-meeting session, the Planning Board decided it would not accept a motion proffered by Mr. Knowles.

The complaint also questioned the Planning Board's practice of conducting its pre-meeting sessions in "a small room in the office area of the Director of Planning and Zoning, which is remote (275 feet and through many doorways) from

the site of the main meeting.” The complaint noted that citizens could easily overlook the “generic notice” of the pre-meeting sessions and instead wait in the normal meeting room, while developers and their attorneys who are more familiar with the practice attend the pre-meeting sessions. While holding these sessions in a separate room may meet the technical requirements of the law, the complaint observed, “it seems to violate the spirit of openness that the rules address.”

Ms. Marsha McLaughlin, Director of the Howard County Department of Planning and Zoning, submitted a timely response on behalf of the Planning Board. By way of background, the response explained that the complaint arose out of the Planning Board’s consideration of a site development plan for a proposed 22-story retail/apartment building in Columbia Town Center. On December 21, 2005, the Planning Board heard from both the applicant and opponents to the project. Several opponents had asked that the case be postponed for a variety of reasons. While the Planning Board had discussed the postponement requests generally during a pre-meeting session on December 21, no decision was made during the pre-meeting session. During the regular meeting, opponents asked the Planning Board not to approve the requested height for the project. The Planning Board then voted to go into closed session to discuss with its legal counsel issues concerning postponement of its action as well as its authority, at this stage of the process, to limit the height of the building. After returning to open session, the Planning Board notified the parties that it would keep the record open until 5:00 p.m. on January 6, 2006, during which period additional information could be presented in writing. The Planning Board indicated that a final decision would be made at its regular meeting on January 18.

On January 18, during its regular meeting, the Planning Board decided not to accept a motion filed by several opponents, including Mr. Knowles, because it was not timely filed. The Planning Board also voted to approve the requested building height on that date.

As to the practice of not keeping minutes of its pre-meeting sessions, the response noted that the Planning Board has altered its practice and began keeping minutes of these sessions effective February 16. Nevertheless, the Planning Board’s position is that its former practice did not violate the Open Meetings Act. Emphasizing that pre-meeting sessions do not involve substantive decisions but instead only procedural matters (*i.e.*, agenda, order of cases to be heard, requests to staff for information to be provided at a meeting), the response noted that “it is

questionable whether the Board considers and takes action on items and/or votes at pre-meetings as contemplated by Section 10-509(c)(1) ...”¹

As to the allegation in the complaint that a decision not to accept a certain motion proffered by Mr. Knowles was made at a pre-meeting session, the response noted the difficulty of responding to an allegation where neither the Planning Board member, the particular motion, nor the date of the alleged action is known. However, according to the response, “[a]s far as can be determined, the Board did not make a decision on any ... motions [addressed in the response] at a pre-meeting.”

Concerning the location of pre-meeting sessions, the response stated that notice is provided of the pre-meeting session in the same manner as of the main meeting itself. The conference room, in the Howard County office building, is reasonably accessible to those who wish to attend. In addition, if a large crowd materialized, the Planning Board would, in all likelihood, move the pre-meeting session to the larger room.

After receipt of the Planning Board’s response, you took issue with the Planning Board’s position that pre-meeting sessions are limited to procedural matters. Your second letter indicated that, when Mr. Knowles was informed at a January 18 work session that the Planning Board would not consider his motion to deny approval of a site plan based on violations of zoning regulations, he was told by a member of the Planning Board that the Planning Board had considered and denied his request at its pre-meeting session. Your second letter also repeated your view that pre-meeting sessions should occur in the same room where the rest of the Planning Board’s meetings are held. On receipt of your letter, we offered the Planning Board an opportunity to respond.

In a timely response on behalf of the Planning Board, Ms. McLaughlin noted the difficulty of responding to the allegation concerning the Planning Board’s action without knowing the identity of the Planning Board member with whom Mr. Knowles apparently spoke. According to the supplemental response, “[w]hat is known is that the Planning Board formally decided to not accept the motion ... at its regular January 18, 2006 public work session ... because the Board considered the motion ... as untimely...” The response also reiterated its position that the location of pre-meeting sessions does not violate the Act.

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

II

Minutes

When a public body like the Planning Board conducts a meeting that is subject to the Open Meetings Act, certain procedural requirements must be satisfied.² One requirement is this: “As soon as practicable after a public body meets, it shall have written minutes of the session prepared.” § 10-509(b). Minutes must reflect each item that the public body considered, the action that the public body took on each, and every recorded vote. § 10-509(c)(1). As we have previously observed, “[m]inutes are an important element in furthering the General Assembly’s policy declaration that ‘public business be performed in an open and public manner.’ ... Those who were not able to attend an open meeting can at least find out the items considered, actions taken, and votes recorded....” 4 *OMCB Opinions* 24, 25 (2004).

In requiring that minutes be kept for each meeting, the Act draws no distinction between “pre-meetings,” “work sessions,” or any other characterization. 4 *OMCB Opinions* 28, 31 (2004). Stated otherwise, if a meeting is subject to the Open Meetings Act, minutes must be kept. That a meeting may concern procedural matters only, such as the sequence of the agenda, does not affect this conclusion. The “manner in which an agenda item is handled ... can have a marked effect on the decision-making process of a public body.” 3 *OMCB Opinions* 78, 83 (2001). Thus, we find that the Planning Board’s practice prior to February 16, 2006, of not keeping minutes of its pre-meeting sessions violated the Act.³

III

Location of Pre-Meeting Sessions

Perhaps, as the complaint suggested, conducting pre-meeting sessions in the same location as other meetings of the Planning Board would be more convenient to the public. However, a violation of the Act occurs only if a public body’s choice

² Although the response contended that the matters considered during the course of these pre-meeting sessions were not the type requiring minutes, we do not interpret the Planning Board’s response as suggesting that its pre-meeting sessions were an executive function outside the scope of the Act. *See generally Wesley Chapel Bluemount Ass’n v. Baltimore County*, 347 Md. 125, 699 A.2d 434 (1997) (discussing the kinds of “zoning matters” that are never excluded from the Act).

³ In reaching this conclusion, we find it unnecessary to attempt to resolve (if we could) the factual issue whether the Planning Board, in a pre-meeting session, decided to reject Mr. Knowles’s motion.

of meeting site imposes a genuine barrier to public attendance – for example, at a site many miles away or in a tiny room. 3 *OMCB Opinions* 118 (2001).

There is no evidence to suggest that anyone was denied access to a Planning Board pre-meeting session due to its location or that those exercising reasonable diligence could not have easily found their way to the session. Nor is there evidence that the conference room is too small to accommodate a normal audience. Under these circumstances, we believe that the Planning Board acts within the zone of reasonable discretion when it conducts its pre-meeting sessions in the conference room, rather than the regular meeting room. Based on the record before us, we find no violation.

IV

Conclusion

In summary, we find that the Planning Board's failure to keep minutes of its pre-meeting sessions before February 16, 2006 violated the Act. We find no violation as to the location in which its pre-meeting sessions are held.

OPEN MEETINGS COMPLIANCE BOARD

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